United Food and Commercial Workers Local Union 540 *and* Pilgrim's Pride Corporation. Case 16–CB–5152

July 31, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

Pursuant to a charge filed on April 8, 1997, against United Food and Commercial Workers Union Local 540, the Respondent, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on August 20, 1997. On January 27, 1998, the General Counsel, the Charging Party, Pilgrim's Pride Corporation, and the Respondent filed a motion to transfer case and continue case before the Board and stipulation to facts.[1] On May 8, 1998, the Board issued an order approving the stipulation, granting the motion, and transferring the proceeding to the Board. Thereafter, the General Counsel, the Charging Party, and the Respondent filed briefs. Simultaneously with the filing of the briefs, the parties filed a supplemental stipulation to facts, which is hereby accepted.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record and the briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

Respondent United Food and Commercial Workers Local 540 is a labor organization within the meaning of Section 2(5) of the Act.

Charging Party Pilgrim's Pride, a Delaware corporation with an office and place of business in Lufkin, Texas, is engaged in the business of poultry processing. During the 12-month period ending January 27, 1998, Pilgrim's Pride, in conducting the operations described above, sold and shipped from its facility goods valued in excess of $50,000 directly to points outside the State of Texas. At all material times, Pilgrim's Pride has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] The parties agreed that the stipulation with attached exhibits, including the charge, the complaint and notice of hearing, and the Respondent's answer, constitute the entire record in this case, and that no oral testimony is necessary or desired. The parties waived a hearing before an administrative law judge, the making of findings of fact and conclusions of law by an administrative law judge, and the issuance of an administrative law judge's decision; and indicated a desire to submit this case directly to the Board for findings of fact, conclusions of law, and the issuance of a Decision and Order.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Facts

At all times material to this case, the Respondent Union has been the exclusive bargaining representative, pursuant to Section 9(a) of the Act, of the following employees of the Charging Party:

> INCLUDED: All production, warehouse, shipping and sanitation workers at the Charging Party's Lufkin plant.
>
> EXCLUDED: Maintenance, quality control, drivers, office clerical, watchmen, guards, salaried supervisors, hourly forepersons, leads, shipping clerks, purchasing clerks and cafeteria employees.

At all times material to this case, the Charging Party and the Respondent have been parties to a collective-bargaining agreement, which is effective from August 11, 1996, through midnight August 10, 1998. Article V, section A, subsection 1 of that agreement contains the following dues-checkoff clause:

> The Company shall deduct, as to each employee who shall authorize it in writing on a proper and lawful form as in Exhibit 1, Union Representation Fees, Union Dues and Initiation Fees as certified by the Union as due and owing on a weekly, bi-weekly or monthly basis as requested by the Union.

The agreement, at article V, section A, subsection 3, also contains the following provision:

> The Union agrees to indemnify and save the Company harmless against any and all claims, suits or other forms of liability arising out of the deductions of money for Union dues from any employee's pay.

Attached to the collective-bargaining agreement, as exhibit 1, is a sample dues-checkoff authorization, which in pertinent part reads as follows:

> This Checkoff Authorization and Agreement is separate and apart from the Membership Application and is attached to the Membership Application only for convenience.
>
> CHECKOFF AUTHORIZATION
>
> TO: Any Employer under contract with United Food and Commercial Workers Union, Local 540, AFL–CIO
>
> You are hereby authorized and directed to deduct from my wages, commencing with the next payroll period, an amount equivalent to dues and initiation fees as shall be certified by the Secretary-Treasurer of Local 540 of the United Food and Commercial Workers International Union, AFL–CIO, and to remit same to said Secretary-Treasurer.

> This authorization and assignment is voluntarily made in consideration for the cost of representation and collective bargaining and is not contingent on my present or future membership in the Union. This authorization and assignment shall be irrevocable for a period of one (1) year from the date of execution or until the termination date of the agreement between the Employer and Local 540, whichever occurs sooner, and from year to year thereafter, unless not less than thirty (30) days and not more than forty-five (45) days prior to the end of any subsequent yearly period I give the Employer and Union individually written notice by certified Letter to the Secretary-Treasurer of Local 540 of revocation bearing my signature thereto.
>
> The Secretary-Treasurer of Local 540 is authorized to deposit this authorization with any Employer under contract with Local 540 and is further authorized to transfer this authorization to any other Employer under contract with Local 540 in the event that I should change employment.

On various dates between 1993 and 1996, employees Darwin Huitt, Jesus Gonzales, Anthony Handy, Carmen Penson, Edwinna Lewis, Altherman Gibson, Noemi Soto, Roberto Perez, Juanita Hernandez, and Johnnie Rodgers executed and submitted checkoff authorizations using the form set forth above. On various dates subsequent to each employee's execution of the checkoff authorization, the employee ceased employment with the Charging Party. On termination of employment, each employee forfeited all seniority rights and other rights under the parties' collective-bargaining agreement.

Each of the employees named above was subsequently rehired, as a new employee, by the Charging Party. On the employee's rehire, the Charging Party withheld dues from each employee's wages pursuant to the previously executed checkoff authorization. None of the employees executed another checkoff authorization after rehire by the Charging Party. On various dates in 1997, the Charging Party ceased deducting dues from the pay of employees Handy, Penson, Gibson, and Rodgers, because the employees had requested that the Charging Party do so. The Charging Party continued, at all times material here, to deduct dues from the pay of the remaining employees named above.

On January 27, 1997, the Respondent filed a grievance asserting that the Charging Party had violated the collective-bargaining agreement by ceasing to deduct dues from the pay of employees Handy, Penson, Gibson, and Rodgers, and asserting that their previously executed checkoff authorizations remained valid for this purpose. On May 19, 1997, the Respondent filed a complaint in the U.S. District Court for the Eastern District of Texas seeking to compel the Charging Party to submit the Respondent's grievance to arbitration. On November 5, 1997, the district court granted the Respondent's Motion for Summary Judgment and ordered the parties to submit the dispute to arbitration.[2] On March 9, 1998, following submission of the dispute to arbitration, arbitrator Barnett M. Goodstein issued his award finding that the Charging Party had violated the collective-bargaining agreement "by refusing to withhold Union dues from those employees who had signed Checkoff Authorizations, and which authorizations had not yet expired under their terms, and were still in existence at the time of rehire."[3] In reaching this conclusion, the arbitrator confined his analysis to an interpretation of the parties' collective-bargaining agreement, and specifically refused to consider the Charging Party's contention that continued dues withholding would violate the Act.

By letter dated March 16, 1998, the Charging Party refused to comply with the arbitrator's award. On October 15, 1999, the United States Court of Appeals for the Fifth Circuit issued its decision affirming an order of the U.S. District Court enforcing the arbitrator's award.[4]

B. Contentions of the Parties

The General Counsel asserts that the Respondent unlawfully filed a grievance for the purpose of compelling the Charging Party to deduct dues from the wages of its employees when they were rehired following a break in employment. According to the General Counsel, it is a longstanding principle of Board law that severance of an employment relationship extinguishes an individual's obligation under a dues-checkoff authorization.[5] Based on the stipulated facts, the General

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[2] *Food & Commercial Workers Local 540 v. Pilgrim's Pride Corp.,* No. 9:97CV182 (TH).

[3] The arbitrator provided the following remedy (emphasis in original):

> SUBJECT TO THE FURTHER RULING OF EITHER THE [National Labor Relations] BOARD OR A COURT OF COMPETENT JURISDICTION IN A FINAL DECISION, the Company is ordered to reimburse the Union for all such dues and other authorized deductions, not withheld from the wages of rehired employees with continuing authorizations, and not then paid over to the Union; and to begin deducting from all such employees with continuing authorizations, still in effect, all such dues and other authorized deductions, until the authorization is terminated in accordance with its terms. The indemnity provisions of the Agreement should protect the Company in the event any final decision reverses this award.

[4] *Food & Commercial Workers Local 540 v. Pilgrim's Pride Corp.,* 193 F.3d 328 (5th Cir. 1999).

[5] The General Counsel cites *Railway Clerks (Yellow Cab),* 205 NLRB 890, 891 (1973), enfd. 498 F.2d 1105 (5th Cir. 1974), where the Board stated that

Counsel asserts that these employees severed their employment relationship and that the Respondent, by attempting to cause and by causing the Charging Party to deduct dues from the wages of the rehired employees, without first securing a new dues-checkoff authorization, has violated Section 8(b)(1)(A) and (2). The General Counsel further asserts that, contrary to the Respondent's position, the particular language of the dues checkoff form used by the Respondent does not "clearly and unmistakably" authorize these dues deductions, as is required by the Board's decision in *Electrical Workers Local 2088 (Lockheed Space).*[6] The General Counsel also contends that the Board should not defer to the arbitrator's award in the Respondent's favor.

The Charging Party likewise asserts that the Respondent has violated the Act by insisting that the Charging Party commence dues deductions for employees who are hired as new employees after a prior period of employment and who have not signed a new dues-checkoff authorization on their being reemployed by Pilgrim. The Charging Party also claims that the arbitrator's interpretation of the checkoff authorization language is in error, and that the arbitrator compounded his error by choosing to ignore Board and court decisions establishing that a dues checkoff authorization is terminated on the severance of the employment relationship.[7]

The Respondent contends that the Board and court decisions cited by the General Counsel do not establish a rule that all dues-checkoff authorizations are void on termination of employment. Instead, the Respondent asserts that the specific language of the authorization is controlling. The Respondent points out that an arbitrator has issued a final and binding award finding that the Respondent's dues-checkoff authorization survives termination of employment and extends to rehired employees, and asserts that no policy of the Act prohibits its enforcement of the award. Relying on *Lockheed,* supra, the Respondent also contends that, to the extent employees must "clearly and unmistakably" agree to such deductions, that standard is satisfied by the language of the checkoff clause in this case.

C. Analysis and Conclusions

The complaint in this case alleges that the Respondent violated Section 8(b)(1)(A) and (2) by filing a grievance to compel the Charging Party to deduct dues from the wages of the rehired employees, and by filing a lawsuit to compel the Charging Party to arbitrate that grievance; i.e., by submitting this dispute concerning the meaning and application of the dues checkoff authorizations to the contractual grievance-arbitration process. For the reasons that follow, we find that the Respondent did not violate the Act by the acts and conduct alleged in the complaint. The broader question addressed in the parties' briefs—whether the Respondent could lawfully require the Charging Party to resume deducting dues from rehired employees, after a break in employment, on the basis of the dues checkoff authorizations signed by these employees, during a prior period of employment—is not before us in this case. The issue is, however, addressed in *The Kroger Co.,* 334 NLRB No. 113 (2001).[8]

In *Bill Johnson's Restaurants v. NLRB,*[9] the Supreme Court held that the Board may not enjoin a state court lawsuit, regardless of the plaintiff's motive in filing the lawsuit, unless the suit lacks a reasonable basis in fact or law. The Court recognized that "[a] lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation" against employees who have engaged in protected activity.[10] However, the Court held that these interests must be balanced against the First Amendment right of access to the courts and the interest of each state in maintaining domestic peace by "providing a civil remedy for conduct touching interests 'deeply rooted in local feeling and responsibility.'"[11] In order to accommodate these interests, the Court held that "the filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act."[12] Where, however, the lawsuit lacks a reasonable basis in fact or law, these interests

when an individual severs his employment relationship, he also severs any obligation under a signed checkoff authorization, and that such obligation cannot be revived until the individual has signed a new authorization.

The General Counsel also cites *Industrial Towel & Uniform Service,* 195 NLRB 1121 (1972), enf. denied 473 F.2d 1258 (6th Cir. 1973) (same).

[6] 302 NLRB 322, 328 (1991). The General Counsel also notes that, in *Lockheed,* the Board defined a dues-checkoff authorization as a "partial assignment of a future right, that is, an employee (the assignor) assigns to his union (the assignee) a designated part of the wages he will have a right to receive from his employer (the obligor) in the future, so long as he continues his employment." Id. at 327.

[7] The Charging Party cites, inter alia, *Railway Clerks,* supra, and *Industrial Towel & Uniform Service,* supra.

[8] As explained below, in *The Kroger Co.,* we hold that the language of the dues check-off authorization involved both in that case and in this one did not constitute a clear and unmistakable waiver of employees' Section 7 rights. We also explain why the Board there was not required to defer to the arbitrator's award in this case.

[9] 461 U.S. 731 (1983).

[10] Id. at 740.

[11] Id. at 741 (quoting from *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 244 (1959)).

[12] Id. at 743.

do not come into play. Accordingly, "it is an enjoinable unfair labor practice to pursue a baseless lawsuit with the intent of retaliating against an employee for exercising rights protected by § 7 of the NLRA."[13]

In *Longshoremen Local 7 (Georgia-Pacific),*[14] the Board applied these principles to the grievance-arbitration process. In *Georgia-Pacific,* the respondent union filed grievances seeking to compel an employer to pay wages in lieu of assigning disputed work to employees represented by the union. The union ultimately obtained an award in its favor from an arbitrator. However, the Board subsequently issued a Section 10(k) jurisdictional award finding that employees represented by the union were not entitled to perform the disputed work. The Board thereafter considered whether the union, by filing "in lieu of" grievances both before and after the Board issued its 10(k) award, violated Section 8(b)(4)(D).

The Board noted that "national labor policy encourages resort to the grievance-arbitration procedure as the preferred method of resolving labor-management disputes."[15] The Board stated that preserving access to the grievance machinery closely parallels the First Amendment concerns cited by the Supreme Court in *Bill Johnson's* and that the Federal policy favoring private resolution of labor disputes is analogous to "the states' interest in the maintenance of domestic peace, which was stressed in the *Bill Johnson's* analysis."[16] Accordingly, the Board concluded that "[t]hese weighty interests, like the ones the Court discussed in *Bill Johnson's,* militate against a rule barring the processing of an arguably meritorious pre-10(k)-award work assignment grievance simply on a showing of prohibited motive."[17] The Board has consistently applied these principles to efforts by a party to obtain arbitration of a variety of disputes, including claims of single employer status and accretion to an existing unit,[18] efforts to apply a collective-bargaining agreement to alleged owner-operators,[19] and efforts to merge bargaining units.[20]

Consistent with these principles, we hold that the submission to grievance arbitration of an arguably meritorious claim concerning the meaning of a dues checkoff authorization, without more, is not an unfair labor practice. Federal labor policy strongly favors the use of the grievance-arbitration process. The Board, in turn, has observed that:

> [t]he Act itself requires only, in Section 302 (c)(4), that employees be accorded an opportunity to revoke their checkoff authorizations at least once a year and at the termination of any applicable collective-bargaining agreements. Beyond that, it is well-established Board law that disputes about dues checkoff procedures essentially involve contract interpretations rather than interpretation and application of the Act. Furthermore, the Board has specifically recognized that such contract issues are fully capable of resolution through arbitration [footnotes omitted].[21]

In recognition of the contractual nature of such disputes, the Board will defer processing of unfair labor practice charges while the parties present the dispute to an arbitrator.[22] In appropriate cases, the Board will also defer to an arbitrator's award resolving the dispute.[23] In these circumstances, it would be anomalous, to say the least, and inconsistent with the principles set forth in *Bill Johnson's* and *Georgia Pacific,* to find that the

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[13] Id. at 744. In *Bill Johnson's,* the Supreme Court also observed that the case before it was not

> a suit that is claimed to be beyond the jurisdiction of the state courts because of Federal-law preemption, or a suit that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits. Nor could it be successfully argued otherwise.

Id. at 738 fn. 5 (citation omitted.)

[14] 291 NLRB 89 (1988), enfd. 892 F.2d 130 (D.C. Cir. 1989).

[15] *Georgia-Pacific,* supra at 92, citing Sec. 203(d) of the Act. The Supreme Court has repeatedly recognized the importance of this Congressional policy in the promotion of industrial stability and peace. See, e.g., *Paperworkers v. Misco,* 484 U.S. 29, 37 (1987) (Federal labor policy "reflect[s] a decided preference for private settlement of labor disputes without the intervention of government.").

In furtherance of the Congressional policy, the Board has for many years withheld its authority to adjudicate alleged unfair labor practices in cases where the parties have agreed to submit the dispute to binding grievance-arbitration. See *United Technologies Corp.,* 268 NLRB 557 (1984) and *Collyer Insulated Wire,* 192 NLRB 837 (1971) (prearbitral deferral to grievance-arbitration machinery); *Spielberg Mfg. Co.,* 112 NLRB 1080 (1955) (deferral to arbitrator's award).

[16] *Georgia-Pacific,* supra at 93.

[17] Id.

[18] *Hotel & Restaurant Employees Local 274 (Warwick Caterers),* 282 NLRB 939 (1987). Compare, *Teamsters Local 776 (Rite Aid),* 305 NLRB 832 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993) (suit to enforce arbitration award accreting employees to existing unit was unlawful, where Board had previously found unit to be separate).

[19] *Teamsters Local 483 (Ida Cal),* 289 NLRB 924 (1988).

[20] *SEIU Local 32B-32J (Vaux Condominium),* 313 NLRB 267 (1993).

[21] *Furr's, Inc.,* 264 NLRB 554, 556 (1982).

[22] Id. See also *The Associated Press,* 199 NLRB 1110 (1972), rev. denied 492 F.2d 662 (D.C. Cir. 1974) (Board deferred to arbitrator's award finding that certain employees failed to effectively revoke dues checkoff authorizations, and ordered *Collyer* deferral on issue of whether checkoff authorizations were terminable at will during contract hiatus).

[23] Id.

mere submission of such a dispute to grievance arbitration, without more, is unlawful.[24]

Applying these principles to the facts of this case, we find that the grievance filed by the Respondent was arguably meritorious. To begin, we reject the General Counsel's contention that, as a matter of statutory law, dues-checkoff clauses expire when employment is severed. Accepting this contention, of course, would preclude the position taken by Respondent's grievance. Next, we conclude that Respondent's position was colorable, as a matter of contract interpretation, considered in light of the legal requirement that waivers of Section 7 rights must be clear and unmistakable.

As discussed above, the Board has consistently recognized that, apart from the requirement for periodic revocability set forth in Section 302(c)(4), "disputes about dues checkoff procedures essentially involve contract interpretations rather than interpretation and application of the Act."[25] In *Electrical Workers Local 2088 (Lockheed Space),*[26] the Board reaffirmed this principle. It held that Section 7 of the Act protects both the right to join and assist unions and the right to refrain from doing so, and that paying dues to a union is a form of assistance. The Board acknowledged that an employee could waive that Section 7 right, for example by agreeing through a checkoff authorization to pay union dues and fees for a certain period irrespective of whether he remained a union member. The Board held, however, that an employee's agreement to such an arrangement must be manifested in "clear and unmistakable language."[27] It would be inconsistent with these principles to hold (as the General Counsel and the Charging Party suggest) that, regardless of its specific terms, a dues checkoff authorization may never remain effective when an employee is rehired following a severance of employment.[28]

The Board's holdings in *Railway Clerks* and *Industrial Towel* do not compel a different result here. In those cases, we stated that

> when an individual severs his employment relationship, he also severs any obligation under a signed checkoff authorization, and that such obligation cannot be revived until the individual has signed a new authorization.[29]

But this statement was necessarily based on the specific language of the authorizations signed by the employees in those cases.[30] In any event, to read these cases as establishing a per se rule that a checkoff authorization can never survive the severance of employment would be inconsistent with the Board's longstanding recognition that the meaning and application of a dues checkoff clause is primarily a question of contract interpretation.[31]

We turn now to the specific language of the dues-checkoff authorization in this case, which provided for the deposit of the authorization "with any Employer under contract with" the Respondent and which further provided for the transfer of the authorization "to any other Employer" if the employee "should change employment." In *The Kroger Co.*, we find that this language was not a clear and unmistakable waiver of employees' Section 7 rights, the standard to be applied in the context of that case. The issue, here, in contrast, is not whether the language amounted to a waiver, but whether the Respondent *could colorably argue* that it was. We believe that such an argument was colorable—when the grievance was filed—even though we have since rejected it. Indeed, an arbitrator found that the Respondent's position was in fact meritorious.[32] Moreover, the Respondent's position is, at least to some extent, consistent with the Charging Party's actions, in that the Charging Party automatically resumed dues withholding from the pay of rehired employees on the basis of their previously executed authorization forms, and ceased the ~~withholdings only for employees w~~who had made a re-

[24] See also *Auto Workers Local # 1752 (Schweizer Aircraft),* 320 NLRB 528 (1995), rev. denied sub nom. *Williams v. NLRB,* 105 F.3d 787 (2d Cir. 1996) (union lawfully filed a grievance seeking to compel employer to continue dues checkoff from an employee who had resigned from the union but was subject to lawful union security clause).

[25] *Furr's*, supra at 556.

[26] 302 NLRB 322, 327 (1991).

[27] *Schweizer Aircraft,* supra at 531.

[28] Accordingly, the Respondent's invocation of the grievance arbitration process did not have an illegal objective within the meaning of fn. 5 of the Supreme Court's decision in *Bill Johnson's.* See fn. 13, supra.

[29] *Railway Clerks,* supra at 891. See also *Industrial Towel,* supra.

[30] The checkoff authorization forms in *Railway Clerks,* supra at 894–895, and *Industrial Towel,* supra at 1125, were substantially identical. They did not contain any of the provisions found in the authorization forms executed by the employees in this case, which the Respondent invokes to establish that the authorizations survived the employees' breaks in employment. Further, these cases do not address the issue, discussed in *Lockheed,* of whether the employees, by signing the disputed checkoff authorizations, had waived their Sec. 7 rights to refrain from supporting the union.

[31] The Board in *Lockheed* characterized a dues checkoff authorization as a "partial assignment of a future right, that is, an employee (the assignor) assigns to his union (the assignee) a designated part of the wages he will have a right to receive from his employer (the obligor) in the future, so long as he continues his employment." *Lockheed*, supra at 327. For the reasons stated above, this characterization should not be read as establishing a per se rule with regard to the meaning or application of dues checkoff authorizations.

[32] *Georgia-Pacific,* supra at 93 (grievance found "arguably meritorious" for *Bill Johnson's* analysis in part because union had prevailed in arbitration).

who had made a request to the Charging Party that it do so.[33]

Conclusion

For the reasons set forth above, we find that the Respondent's contention that the Charging Party violated the collective-bargaining agreement by ceasing dues withholding on behalf of employees Handy, Penson, Gibson, and Rodgers, was arguably meritorious. Accordingly, we hold that the Respondent did not violate Section 8(b)(1)(A) and (2) by filing a grievance concerning this matter, and by filing a lawsuit to compel the Charging Party to submit the dispute to arbitration. Because these are the only acts alleged in the complaint to have violated the Act, we shall dismiss the complaint. We express no view concerning any of the other actions, not alleged to be unlawful in the complaint, which the Respondent and the Charging Party have taken with respect to the deduction of dues from the pay of the Charging Party's employees.

CONCLUSIONS OF LAW

1. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

2. The Charging Party is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Respondent has not violated the Act as alleged in the complaint.

ORDER

The complaint is dismissed.

[33] Our finding that the Respondent's position was arguably meritorious does not, of course, mean that the Board would necessarily "have made the same interpretation of the contract on *de novo* review of the facts…" *Furr's,* supra at 557.